

Trauma and criminal law

Michael L. Perlin, Esq.

Adjunct Professor of Law, Emory University School of Law

Instructor, Loyola University New Orleans, Department of Criminology and Justice

Professor Emeritus of Law

Founding Director, International Mental Disability Law Reform Project

Co-founder, Mental Disability Law and Policy Associates

New York Law School

mperlin@nyls.edu

mperlin@mdlpa.net MENTAL DISABILITY LAW AND POLICY ASSOCIATES

1

Topics of importance

- How do we treat trauma-related disabilities in criminal courts?
- What is the role of trauma in the legal treatment of people with mental disabilities?
- What is the relationship between trauma and disability-focused stigma?
- How might we apply concepts of therapeutic jurisprudence as means of reducing stigma in this context?
- Focusing here on the relationship between trauma and incompetency, insanity and sentencing

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

2

About trauma: what we know

- There is a high correlation between exposure to trauma and the impact on mental health.
- People with mental disabilities and people who have been involved in the criminal justice system have a much higher risk of being exposed to trauma and developing PTSD, compared to the general population.
 - See generally, Meghan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 Fla. J. Int'l L. 271 (2017).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

3

What we know, 2

- Many who experience life in institutions--both short term and residential institutions--are often subjected to trauma, simply by virtue of being in the institution, but also are often subjected to forced medication, restraint, and seclusion, all of which are traumatic events that can have long lasting impacts on an individual's mental and physical health.
- "[E]ven as a practice of last resort, the threat of force can cause distress and undermine recovery."*
 - Sandy Watson et al., *Care Without Coercion-Mental Health Rights Personal Recovery and Trauma-Informed Care*, 49 Aust. J. Soc. Issues 529, 535 (2014).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

4

What we know, 3

- Individuals who have experienced trauma are often more prone to becoming addicted to substances or to committing criminal offenses.*
 - * See Jillian M. Cavanaugh, [*Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*](#), 45 New Eng. L. Rev. 463, 468 (2011).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

5

Incompetency to stand trial: Trauma and exacerbation of psychiatric symptoms

- Lack of adequate community competency evaluation and restoration options*
 - Often, "restoration" simply involves administering antipsychotic medication that limits/eliminates delusional thinking but does not authentically give the defendant the capacity to rationally consult with counsel.
- Other resource problems
 - Rare for funds to be made available to allow for psychotherapeutic interventions.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

6

Trauma and exacerbation of psychiatric symptoms, 2

- Consequences of systemic breakdowns in the competency evaluation and restoration process
- Excessive delays in competency evaluation & restoration regularly results in lengthy incarceration of defendants

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

7

Trauma and exacerbation of psychiatric symptoms, 3

- Involuntary medication and restraint Issues
 - Persons with mental illness are more likely to
 - Be physically restrained
 - Be involuntarily medication for "dangerousness" or for competency restoration (*Sell v. United States*, 539 U.S. 166 (2003))*
 - For those with PTSD and trauma histories, restraints can be particularly problematic in terms of exacerbation of symptoms

* See Michael L. Perlin & Meredith R. Schriver, "You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality, 8 ALBANY GOV'T L. REV. 381 (2015).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

8

Trauma and exacerbation of psychiatric symptoms, 4

- Decompensation in jail
 - Persons with mental illness are more likely to
 - obtain infractions for behavioral problems in custody
 - refuse medication in a correctional setting
 - be victimized by other inmates and correctional staff
 - For those with PTSD and trauma histories, jail may exacerbate their symptoms or trigger re-emergence of dormant symptoms

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

9

Trauma and exacerbation of psychiatric symptoms, 5

- Delay in case resolution
- Consider the reality that defendants held in jail pre-trial are acquitted at a far lower rate than those who are able to make bail.
 - *United States v. Gallo*, 653 F. Supp. 320, 338 (E.D.N.Y. 1986)
 - "Even where all other factors are held constant, studies indicate that detention increases the chances of harsher and longer sentences."
 - *State v. Johnson*, 294 A.2d 245, 251 n.6 (N.J. 1972)
 - "[A]n accused who has been detained in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail."

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

10

Trauma and exacerbation of psychiatric symptoms, 6

- Common systemic problems causing excessive delays in competency evaluations & restoration
- Lack of sufficient numbers of inpatient hospital beds designated for competency evaluation and restoration
- Lack of sufficient numbers of competency evaluators

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

11

Trauma and exacerbation of psychiatric symptoms, 7

- Solitary confinement
 - Can exacerbate multiple forms of mental illness
 - Can also cause *de novo* mental illness*
 - Used as a form of punishment for behavior that may be mental illness-related (as opposed to offering treatment that would better address the underlying cause).**
 - * See e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *Crime & Delinquency* 124, 126 (2003).
 - ** See e.g., Michael L. Perlin, "God Said to Abraham/Kill Me a Son": *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 *AM. CRIM. L. REV.* 477 (2017).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

12

Proposed solutions

- Increase community-based options for competency evaluation and restoration for misdemeanants and non-dangerous felonies
 - Is this mandated by the ADA?
- Increase outpatient competency evaluations
- Streamline competency evaluations
 - What is the reason for the outlandish delays in having jail inmates transferred to a forensic hospital for evaluation?
- Increase numbers of evaluators*
 - * See Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALABAMA L. REV. 193 (2000); Susan McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 GEO. L.J. 601 (2019).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

13

Insanity

- A question I asked >30 years ago:
 - "Does the fact that scientists appear to understand more about brain chemistry, physiology, neurology, and the effect of physical and psychological trauma on criminally irresponsible behavior matter?"*
 - How do we answer this today?
 - What are the implications of our answers?
 - And what impact do our answers have on *other* aspects of mental disability law?*
 - *Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 642 (1989-90)

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

14

Insanity, 2

- In the context of traumatic PTSD:
- **Myth:** PTSD is a common "excuse" for a crime
- **Reality:** PTSD is rarely successfully malingered in criminal defense cases
 - Psychosis is predominant symptom affecting ability to engage in legal process or negating *mens rea*; NOT a prominent feature of PTSD
 - 8000+ insanity acquittees in 8 states: PTSD was used in 0.3% of the cases and was only 29% successful.*
 - * Paul S. Appelbaum et al., *Use of Posttraumatic Stress Disorder to Support an Insanity Defense*, 150 Am. J. Psychiatry 299, 231 (1993).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

15

GBMI, 1

- Misconceptions about GBMI statutes
- Jurors led into false sense that there is a guarantee that a defendant found GBMI will get mental health treatment
- Jurors do not understand consequences of NGRI acquittals or of GBMI verdicts.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

16

GBMI, 2

Realities of a finding of GBMI and GMI and trauma:

- Deprivation of minimally adequate mental health treatment
- Potential of extended periods of solitary confinement
- Potential of being exposed to excessive force
- Risk of extended sentences due to infractions because of mental illness, resulting in further trauma and exacerbation of symptoms.
- Inadequate discharge planning from prison and re-entry problems

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

17

Role of expert witness?

- "The investigation into a client's life history must include trauma history."
 - Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases, 78 Tex. B.J. 460 (2015) (guidelines for death penalty defense counsel working with expert witnesses).*
- I believe this applies to non-death penalty cases as well, both civil and criminal
 - * But compare Davis v. State, 486 S.W. 3d 398 (Mo. 2016), rejecting appellant's arguments, in capital case, that trial counsel were ineffective for failing to call an appropriate expert to present defendant's complete psychosocial, psychosexual, and trauma history in the penalty phase of the trial as mitigating evidence.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

18

An *extra* expert witness?

- As discussed earlier, there are times when an additional expert witness should be retained to explain to jurors why their preconceptions about persons with mental disabilities are, bluntly, all wrong.*
- * See Michael L. Perlin, "Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-finders Rely on Heuristic Reasoning and "Ordinary Common Sense," 13 L.J. Soc'L JUST. 88 (2020).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

19

Death penalty

- Death penalty litigation and policy "connects with" the question that we focus on here in two different ways.
- (1) The American Bar Association has taken this position:
 - Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a **traumatic brain injury**.*
 - * Recommendations of the American Bar Association Section Of Individual Rights And Responsibilities Task Force On Mental Disability And The Death Penalty, 54 CATH. U. L. REV. 1115 (2005).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

20

Death penalty, 2

- (2) There have been multiple cases litigated that alleged that defense counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), in not raising a defendant's PTSD to seek mitigation of a death penalty verdict.
- NB: I second-sat *Strickland* at the US Supreme Court, so can discuss that later...

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

21

Death penalty, 3

- Courts have been mixed in their responses.

- Compare James R. Johnson, Clark Cnty. Ind. Prosecuting Attorney, <http://www.clarkprosecutor.org/html/death/US/johnson750.htm>, archived at <http://perma.cc/EC88-HV55> (discussing James R. Johnson, the defendant and a Vietnam War veteran, who unsuccessfully alleged ineffective assistance of counsel on appeal for failure to interview prosecution witnesses and present accurate evidence in support of his PTSD defense), to *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), reversing the sentence after the court held that counsel failed to conduct a basic investigation of mitigating factors including suicide attempts, psychiatric hospitalization, traumatic experiences in the Vietnam War, a diagnosis of personality disorder, and a history of major drug problems.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

22

What can counsel do?

- Embrace trauma-informed practice.
- Trauma-informed practice recognizes the ways in which trauma impacts systems and individuals.”*
- Trauma-informed practice is the idea that the practitioner puts the needs of the trauma-exposed client at the forefront of his/her approach to lawyering.
 - * Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma Informed Lawyering*, 22 Clinical L. Rev. 359, 369 (2016) (the most valuable trauma-focused article to read)
- It is important for lawyers to recognize and understand trauma and its impacts on clients--particularly on clients with mental disabilities--instead of simply being sympathetic to said clients.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

23

What can counsel do, 2

- Legal professionals must recognize that seeking legal assistance in of itself can be a traumatic experience--and this is particularly true for clients who are forced to relive traumatic events in their interactions with the legal system.
- Lawyers need to be especially sensitive to the needs and intricacies of working with clients who have experienced trauma--particularly those with mental disabilities--and a trauma-informed approach to lawyering helps to ensure a more client-centered, holistic approach.
- Lawyers must utilize a human rights approach to addressing the needs of people with trauma-related mental disabilities.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

24

From a therapeutic jurisprudence perspective

- TJ informs how lawyers should interact with their clients.
- Lawyers should be particularly aware of their interactions with clients who have experienced trauma, and how their actions may affect these individuals.
- These clients may, for example, be withdrawn, have high anxiety, or be suspicious and untrusting.
- It is important for lawyers to be sensitive to these needs to effectively represent these clients.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

25

From a TJ perspective, 2

- Further, re-exposure to a past event may trigger feelings of fear and anxiety that were felt during the original event for many people who have experienced past trauma.
- This is why it is imperative to treat people with trauma-related injuries in accordance with the principles of TJ in order to – wherever possible --best avoid bringing up past memories that could trigger such feelings.*
 - * See Gallagher & Perlin, *supra*.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

26

From a TJ perspective, 3

- Few judges or defense counsel have any sense of what traumatic brain injury (TBI) means and its potential impact on the defendant's actions.
- The case law – whether on pre-trial questions, matter of competency or insanity, or the death penalty – starkly demonstrates the failure of all the relevant parties to “get” the meaning and impact of TBI on the defendant's subsequent criminal behavior.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

27

From a TJ perspective, 4

- I wrote this 25 years ago, and believe it is still valid today:
 - "Any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective.*
 - * Michael L. Perlin, "The Executioner's Face Is Always Well-Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 235 (1996).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

28

From a TJ perspective, 5

- By way of example, the relationship between TJ and the intersection between TBI and mitigation should be clear.
- We know that sentencing and mitigation trainings offered nationwide by the National Association of Sentencing Advocates are grounded in the core principles of therapeutic jurisprudence.*
 - * Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 788-89 (2005).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

29

From a TJ perspective, 6

- Rebecca Covarrubias's admonition to defense counsel in death penalty cases – to "gather as much information as possible about the defendant's history including police reports, medical records, birth records, pediatric records and hospital records" – sets out a TJ blueprint for the representation of defendants with TBI.*
 - * Rebecca Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 467 (2009).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

30

From a TJ perspective, 7

- Therapeutic jurisprudence can be used as a tool to remediate judicial stereotyping of defendants with traumatic brain injury.
- Prof. Colleen Berryessa has shown the impact of such stereotyping in cases involving defendants with mental illness, with dementia, and with autism, and has demonstrated how judges' false "ordinary common sense" has a significant impact on their decision-making processes.
- Further, she has argued that the therapeutic jurisprudence literature "may also be instrumental in crafting 'therapeutic interventions' that promote judges' cognitive awareness related to ...biases and how such biases in cases involving mental disorders may result in anti-therapeutic outcomes by hindering an offender's potential treatment opportunities."^{*}

^{*} E.g., Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 LAW & SOC'Y REV. 202 (2019); Colleen M. Berryessa, *Judges' Views on Evidence of Genetic Contributions to Mental Disorders in Court*, 27 J. FORENS. PSYCHIATRY & PSYCHOL. 586 (2016).

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

31

Conclusion

- Few judges or defense counsel have any sense of what TBI means and its potential impact on the defendant's actions.
- The case law – whether on pre-trial questions, matter of competency or insanity, or the death penalty – starkly demonstrates the failure of all the relevant parties to "get" the meaning and impact of TBI on the defendant's subsequent criminal behavior.
- If the principles of therapeutic jurisprudence were to be embraced, we would take a major step toward rectifying the imbalances inherent in the current system.^{*}

^{*} See Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Tails in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS L. REV. – (2021) (in press), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777551.

MENTAL DISABILITY LAW AND POLICY ASSOCIATES

32